FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 12 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 913

JOSEPH L. SCLAFANI,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT I. SCHMALHOLZ,
Attorney for Petitioner,
No. 50 Broadway,
New York 4, N. Y.

LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0689

INDEX

	PAGE
Citation of Opinions	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	3
The Grand Jury Proceedings	4
The Illegal Search and Seizure	4
The Statute of Limitations	6
Denial of Bill of Particulars	6
Reasons for Allowance of the Writ	7
1. Abuse of the Grand Jury Process	7
2. Illegal Search and Seizure	11
3. Statute of Limitations	13
4. Denial of Bill of Particulars	15
Conclusion	16
Appendix A	17
Appendix B	19

CASES CITED

	PAGE
Bowman Dairy Co. v. U. S. (1951), 341 U. S. 214, 71 S. Ct. 675, 95 L. Ed. 879	16
Cave v. United States, 159 F. 2d 464 (8th Cir.)	14
Counselman v. Hitchcock, 142 U. S. 547	11
Fryer v. U. S. (1953) U. S. App. D. C. 34, 207 F. 2 134, Cert. Den. 346 U S 885, 74 S. Ct. 135, 98 L. Ed. 389	16
Gouled v. U. S., 255 U. S. 298	11, 12
Hoffman v. U. S., 341 U. S. 479, 71 SC 814	11
In re Fried, 161 F. 2d 453 (2 Cir. 1947)	8
In re National Window Glass Workers, 287 Fed. 219	9
In re Oliver, 333 U. S. 257 (1948)	9
Mulloney v. United States, 79 F. 2d 566 (3 Cir. 1935) cert. den. 296 U. S. 658	8, 11
Myres v. U. S., 174 F. 2d 329 (8th Cir., 1949)	14
Nardone v. U. S., 308 U. S. 338	11
Norcross v. United States, 209 Fed. 13 (9th Cir.)	9
Singer v. U. S., 58 F. (2) 74 (C. C. A. 3rd)	16
United States v. Beacon Brass Co., 344 U. S. 43	14
United States v. Remington, 191 F. 2d 246	9
U. S. v. Andolschek, 142 F. 2d 503 (2d Cir., 1944)	11

PAGE

U. S. v. Coplon, 185 F. 2d 629 (2d Cir., 1950) 11

U. S. v. Croesant, 178 F. 2d 96 (3rd Cir., 1949) 14

U. S. v. Lawn, 115 F. Supp. 674 (S. D N. Y., 1953) .. 8

U. S. v. O'Connor, 237 F. 2d 466 15

STATUTES CITED

Federal Rules of Criminal Procedure, Preliminary Draft (1953) Note, pages 100-101 9

Fifth Amendment 10

Section 3748, 26 U. S. C. 13

18 U. S. C. Sec. 3731 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

JOSEPH L. SCLAFANI,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on March 30, 1959.

Citation of Opinions

The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, page 19 to page 35, is unreported. The opinion of District Judge Rayfiel denying motions made by petitioner before trial is reported at 126 F. Supp. 654, and is printed in Appendix B hereto, *infra*, page 36 to page 39.

Jurisdiction

The judgment of the Court of Appeals with respect to which the Writ of Certiorari is sought was entered on March 30, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

Questions Presented

1. Was not Petitioner rendered immune from prosecution for the crimes charged in the Information because he was compelled to testify before a Grand Jury, in violation of the Due Process Clause of the Fifth Amendment, after the Information was filed?

a. Was not such compelled testimony an unpermissible Examination Before Trial in a criminal action and an abuse of the Grand Jury Process?

b. Did not such compelled testimony both as to personal and corporate records infringe Petitioner's privilege under the Fifth Amendment not to incriminate himself?

2. Were not the statements, admissions and documents obtained from Petitioner by Stealth and Deceit, by Revenue Agents, in violation of the Fourth and Fifth Amendments, after a routine civil audit of a corporate return for the year 1947 had been referred to the Tax Fraud Division of the Internal Revenue Service for investigation of criminal charges against Petitioner personally for the years 1945 to 1949?

3. Should not Counts IV and V of the Information have been dismissed because they were barred by the Statute of Limitations; on their proper dismissal should not respondent's entire case have fallen?

4. Did not the error of the Trial Court and the Court on Application before Trial in failing to grant Petitioner a Bill of Particulars deprive him of a fair trial?

Constitutional Provisions and Statutes Involved

The pertinent Constitutional and Statutory provisions are printed in Appendix A, *infra*, pages 17 to 18.

Statement

Petitioner was convicted after a jury trial before James T. Foley, J., on April 12, 1956 in the District Court for the Eastern District of New York on seven of eight Counts of Information charging violations of Section 145 (b) of the Internal Revenue Code of 1939.[1] The second Count was dismissed by the Court during trial. He was sentenced to a term of 15 months in jail on each of the counts, to run concurrently, and to pay a fine of $5,000.00 each on counts I and VI.

Counts I, II and III of the Information charged Petitioner as president of Joseph L. Sclafani, Inc. with attempting to evade taxes due by the corporation for 1947, 1948 and 1949 by filing false corporate returns.

Counts VI, VII and VIII charged him with evading personal income taxes owing by himself and his wife for 1947, 1948 and 1949 by filing false returns.

Counts IV and V charged him with attempting to evade income taxes due from him and his wife for 1945 and 1946 by making and filing false and fraudulent statements with the Treasury Department between June 21, 1950 and January 12, 1951.[2]

---

1. Appendix A, *infra*, pp. 17-18.

2. The Information was filed February 25, 1954. Petitioner's returns for 1945 and 1946 were filed in March, 1946 and 1947 respectively.

Respondent's theory as to the entire case was "that this was a net worth case" (R. 40) and the Court so charged (R. 2695).

The Grand Jury Proceedings:

After the information was filed and before trial, respondent served two subpoenas returnable July 27, 1954, on Petitioner, requiring his oral testimony, and to produce the books and records of Joseph L. Sclafani, Inc., a corporation. Petitioner appeared before the Grand Jury and upon his refusal to testify on constitutional grounds, was thereupon brought before District Judge Bruchhausen (R. 2024). Petitioner was ordered by the Court to testify before the Grand Jury and testified on July 28, 29 and 30, 1954.

Petitioner subsequently moved to dismiss the Information on the ground that he had been rendered immune from prosecution by reason of compulsory testimony respecting the subject matter of the Information (R. 2840). The motion was denied by District Judge Rayfiel (R. 2871). Judge Rayfiel's opinion is printed in Appendix B, *infra*, pages 36 to 39.

No information or indictment was ever filed against Joseph L. Sclafani, Inc., before or subsequent to the Grand Jury Proceedings. The sole purpose was to enable the respondent to prepare for the criminal trial of Petitioner.

The Illegal Search and Seizure:

The case against Petitioner had its inception when, on May 26, 1950 Agent Sonkin, of the Internal Revenue Service, whose duties were "to go out and make audits of returns assigned for investigation" (R. 111), visited the offices of Joseph L. Sclafani, Inc., to make a "routine

audit" of the corporation's 1947 income tax return (R. 110). He discussed this with Petitioner and received his permission to examine the relevant corporate books. He examined these books on May 26, 1950 and again on June 16, 1950. He again saw Petitioner on this date and discussed only corporate matters (R. 147).

On returning to his office on June 16, 1950, Sonkin testified that, after conferring with his superior and telling him that there might be fraud in this case, he telephoned Petitioner on that date, and asked him to submit a personal net worth statement for the years 1945 to 1949 (R. 158). He did not advise Petitioner of his constitutional rights, or that his statement might incriminate him, or that the status of the case had changed from a civil routine audit of the corporation for the year 1947 to a possible criminal fraud action against Petitioner for the years 1945 to 1949.

Petitioner immediately mailed to Internal Revenue a Net Worth statement for the years 1945 to 1949 (Ex. 22), received by Internal Revenue on June 22, 1950 (R. 149).

Nothing occurred thereafter until August 18, 1950, when Sonkin telephoned Petitioner and made an appointment to see him. By prearrangement he took Special Agent Silbert of the Tax Frauds Section of the Intelligence Division with him (R. 1198, 1209). Silbert introduced himself as "Special Agent" (R. 1209; 1570), "When I introduce myself I normally identify myself. I don't recall what was done on that occasion". Neither informed petitioner of the changed status of the matter.

Silbert in a lengthy conference with Petitioner questioned him as to Exhibit 22 and at the end thereof asked him to submit a new Net Worth statement to him. On that date Petitioner gave to Silbert retained copies of his personal income tax returns for the years 1934 to 1944 (Ex. 328) and sent the new Net Worth statement (Ex. 22A) to him on August 20, 1950.

Petitioner testified (R. 1208) that when Sonkin telephoned him on June 16, 1950 he told him that he needed the net worth statement "to close up the case".

The Statute of Limitations:

Counts IV and V charged Petitioner with knowingly attempting to evade and defeat taxes due and owing to the Government for the years 1945 and 1946. Petitioner's income tax returns for those years were filed in March 1946 (Ex. 1) and March 1947 (Ex. 2). The period of limitation as set forth in Section 3748 (26 U. S. C.) Appendix 9, *infra*, page 18 is six years.

Although these Counts seek to charge Petitioner with attempting to evade his income tax for the years 1945 and 1946, they are predicated on the allegedly false statements made to Internal Revenue Agents in 1950 and 1951.

Denial of Bill of Particulars:

Petitioner moved before Trial and at the opening of the Trial for a Bill of Particulars. Both motions were denied (R. 15, 2828).

In the first four trial days, Respondent introduced 150 exhibits in evidence, the great bulk of which had never been seen by Petitioner, and none of which had ever been seen or made available to his attorneys. Exhibits, bulky and complicated, some of them comprising many pages of accounting matters, including one Exhibit No. 141 (particularly damaging to the defense because of the improper remarks of the Prosecutor, were flashed in front of Petitioner and his attorneys, admitted over objection, and taken away). Counsel for the defense attempted to get these exhibits at the end of the Court day, have them photostated and returned to Respondent. As stated to the Court at that time counsel could not properly examine the

Exhibits when the witnesses were testifying. They had attempted to photostat the documents at the end of the court day at their own expense. The photostats would be returned commingled and blurred and it was impossible for counsel to put them together to make any sense whatsoever. The result was that hours were spent in this attempt and at the end counsel were more confused than when they started out (R. 507, l. 17 to R. 517, l. 2).

The Court attempted to have Respondent let Petitioner's counsel examine these exhibits in the morning prior to the opening of Court, but despite Respondent's reluctant acquiescence and the cooperation of defense counsel throughout the trial, the important Exhibits were unavailable. The procedure heretofore outlined continued until the end of the trial. The Prosecution presented 398 Exhibits, an average of one Exhibit every fifteen minutes. Many of the Prosecution Exhibits were intricate accounting documents which contradicted each other. Their factual basis could never be ascertained in order to cross-examine the witnesses properly as to their accuracy. The Exhibits covered transactions of Petitioner, his father-in-law, mother-in-law, sister-in-law, brothers-in-law, corporations in which Petitioner was interested, transactions of his father, mother, his uncle, his aunts, his brothers and inter-family transactions. Thousands of entries covering transactions over a period of thirty years.

Reasons for Allowance of the Writ

1. Abuse of the Grand Jury Process:

Petitioner moved before Trial (R. 2840) during the Trial (R. 2024) and contended in the Court below that the Information should have been dismissed because respondent abused the Grand Jury Process by utilizing the Grand

Jury as a means of obtaining an Examination Before Trial of Petitioner in a criminal case after the Information had been filed.[3] The Court below held:

> "Even if we were now to assume both that the government proceeded before the Grand Jury, as Sclafani alleges, in order to prepare for trial of the case against him, and that such use of the Grand Jury was inconsistent with the guarantees implicit in the Federal Rules of Criminal Procedure or the Fifth Amendment, our result would be the same, since no injury resulted from the alleged abuse."

Petitioner contends that the decisions of the Court below and the District Court are incorrect and that this Court should grant review. The Court below failed to cite any authority in its opinion in support of its ruling[4] and did not mention *Mulloney* v. *United States*, 79 F. 2d 566 (3 Cir. 1935) Cert. den. 296 U. S. 658, in which that Court at page 579 adopted the lower Court's charge to the Jury, which authority is contradicted by the decision rendered by the Circuit Court herein.

No information or indictment was ever filed against anyone subsequent to the Grand Jury proceedings. It is clear

3. The motions to dismiss the Information and to inspect the Grand Jury minutes were denied by Rayfiel, J. For convenience, his opinion reported in 126 F. Supp. 654 is printed in App. B. *Infra*, pages 36-39. Similar motions made during trial were likewise denied, but the Court marked Petitioner's Grand Jury testimony as Court Exhibit I for use by the Appellate Courts (R. 2043).

4. The Court below did cite *U. S.* v. *Lawn*, 115 F. Supp. 674 (S. D. N. Y., 1953), and *In re Fried*, 161 F. 2d 453 (2 Cir., 1947), stating that the instant case must be distinguished from those cases. Petitioner submits that Lawn cannot be distinguished. *In re Fried* did not involve a Grand Jury. The *Lawn* case cited in the opinion of the Court below involved a completely different question from that considered by this Court in 355 U. S. 301 involving the same defendant.

that the sole purpose of the Grand Jury proceedings was to enable Respondent to prepare for the trial of Petitioner in the Court below.

The scope of permissible inquiry by a Grand Jury is not without limit. The limit of its function is reached and exhausted when an indictment is returned; thereafter it has no further concern with or interest in the matter since the Grand Jury is not an instrumentality for examination before or preparation for trial. See *In re Oliver*, 333 U. S. 257, at 265 (1948); *In re National Window Glass Workers*, 287 Fed. 219; *Norcross* v. *United States*, 209 Fed. 13 (9th Cir.).

There is no such thing as examination before trial in a criminal case. Congress has not granted the prosecution the right in a criminal case to examine witnesses on compulsory process before trial:—a suggestion that the prosecution should be allowed to examine indicted defendants before trial was not even proposed. See Note, pages 100-101, Federal Rules of Criminal Procedure Preliminary Draft (1953). In *National Glass Workers, supra*, the Court said that the Grand Jury power "should not be used for the purpose of securing evidence against defendants under indictment in support of the indictments already found." And in *United States* v. *Remington*, 191 F. 2d 246, the Second Circuit said that if the prosecution should call witnesses in preparation for trial after an indictment had been returned, the conduct "could not be condoned" (at p. 251).

Even under the rules that permit identification by corporation officers of corporate documents, Petitioner's compulsory testimony before the Grand Jury under the guise of the corporate record doctrine in order to prepare a case involving him is an abuse of Grand Jury process.

During the course of the trial Respondent introduced Exhibits 366 and 367 in evidence (R. 1518). It appeared that these exhibits were part of a Grand Jury Exhibit No. 54 for identification (R. 1511). Petitioner claimed that these exhibits were personal records concerning which he was questioned before the Grand Jury and moved during the trial (R. 2024) to dismiss the Information on the ground that his constitutional rights were infringed upon by bringing him before the Grand Jury after the Information was filed and asked that there be made available to him the transcript of the Grand Jury proceedings. The motion was denied. The Court below held that Respondent

> "far from contending that these Exhibits were personal records of Sclafani completely ignored his contention and asserted that they were records of corporate transactions, offering them as a link in the chain of proof that Sclafani had diverted the repayment of certain corporate loans to himself." (Appendix B, *infra*, p. 34.)

Respondent at several times during the trial commented on the fact that Petitioner had claimed these records to be personal records and that this proved that the money he had obtained as represented by those records, were diversions from corporate funds. Thus, whether these records were corporate records as Respondent contended or personal records as Petitioner stated before the Grand Jury, such testimony elicited before the Grand Jury was testimony used against Petitioner at the trial, in violation of the Fifth Amendment.

The Fifth Amendment mandates a clear restraint on Government: "No person • • • shall be compelled in any criminal case to be a witness against himself". The price of infringement of this fundamental constitutional liberty

is immunity against prosecution for the subject matter of the crime concerning which the testimony is compelled.[5]

For the reasons advanced, it is immaterial whether Petitioner was subpoenaed before the Grand Jury as an individual or as an officer of the corporation. To the extent that he was compelled to testify and to identify personal documents, his constitutional rights were violated. To the extent that he was called in any capacity after the Information had been filed, there was an abuse of the Grand Jury process and the Information should have been dismissed.

2. Illegal Search and Seizure:

Petitioner submits that the statements, admissions and documents obtained from him by Agents Sonkin and Silbert should not have been admitted in evidence.

The Court below held that after Petitioner consented to a "routine audit" of a corporate tax return for the year 1947, it was not a violation of his rights under the Fourth Amendment to obtain statements, admissions and documents from him concerning his personal taxes for the years 1945 through 1949, when, without disclosing an altered purpose, the "civil" agent and his superiors brought in a "criminal" investigator. It said:

> "Several cases appear to have held that the failure to disclose that a once 'routine' tax investigation, for which consent was procured, has grown into one to discover whether a crime has been com-

---

5. *Counselman* v. *Hitchcock*, 142 U. S. 547, at 564, 568; *U. S.* v. *Indolschek*, 142 F. 2d 503, (2d Cir., 1944); *Mulloney* v. *U. S.*, 79 Fed. 2d 566, Cert. den. 296 U. S. 658; *Hoffman* v. *U. S.*, 341 U. S. 479, 71 SC 814 at 485; *Nardone* v. *U. S.*, 308 U. S. 338; *U. S* v. *Coplon*, 185 F. 2d 629 (2d Cir., 1950); Cf. *Gouled* v. *U. S.*, 255 U. S. 298.

> mitted, renders the subsequent entries fraudulent and infects the accompanying search. See, e.g., Matter of Bodkin, 165 F. Supp. 25 (E. D. N. Y. 1958); United States v. Lipschitz, 117 F. Supp. 466 (E. D. N. Y. 1954); United States v. Guerrina, 112 F. Sup. 528 (E. D. Pa. 1953); Cf. United States v. Wolrich, 129 F. Supp. 528 (S. D. N. Y. 1955). We think that the reliance of these cases on the rule of Gouled v. United States, 255 U. S. 298 (1921) is misplaced, and that in circumstances such as these the failure to disclose the changing course of the investigation is not fraudulent or deceitful. See Turner v. United States, 222 F. 2d 926 (4 Cir. 1955) and cases cited." (Appendix B, *infra*, p. 28.)

Petitioner submits that the Court below erred in disregarding the lower court decisions on this question cited in its opinion and also in misconstruing *Gouled* v. *United States*, 255 U. S. 298, where this Court said at page 305:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be; it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.

"Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound * * *."

3. Statute of Limitations:

The Court below refused to pass on whether Counts IV and V were time-barred because it said the conviction and sentence are sustainable whether or not Counts IV and V were proper.

Petitioner contends that Counts IV and V of the Information should have been dismissed because they were barred by the Statute of Limitations.[6] Upon their proper dismissal the entire mass of evidence presented in connection with those Counts was incompetent and should have been excluded. Upon its exclusion, the whole case would have fallen.

Section 3748, 26 U. S. C., prescribing periods of limitation is set forth in full in Appendix A at page 18. This section provides a period of limitation of six years, for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof.

The Information in this case was filed more than six years after Petitioner's returns for 1945 and 1946 were filed.

Counts IV and V seek to charge Petitioner with attempting to evade his income taxes for the years 1945 and 1946. These counts however, charge Petitioner with attempting in 1950 and 1951 to evade taxes for 1945 and 1946 by making false statements to Internal Revenue Agents. This effort was apparently made on the basis of the indictment

---

6. A motion to dismiss said Counts was made before trial. This motion was denied (R. 2854). The opinion of Rayfiel, J., is reported in 126 F. Supp. 654 and is printed in App. B. at pages 36-39.

which was before this Court in *United States* v. *Beacon Brass Co.*, 344 U. S. 43. However, in *Beacon Brass* this Court expressly deferred consideration of the applicability of the statute. In that connection the Court said:

> "Appellees contend that the acts charged constitute only one crime of tax evasion that was complete when the allegedly false return was filed. On this basis, appellees seek to sustain the decision below on ground that the six year Statute of Limitations had run and that the dismissal of the first indictment is res adjudicata and a bar to the second indictment for the same offense. We do not consider these questions because our jurisdiction on this appeal is limited to the District Court's construction of the Statute in light of the facts alleged in the indictment" (18 U. S. C. Sec. 3731).

Beacon Brass thus expressly left undecided the bar of the statute in this precise type of prosecution, although Black, J., noted his vote to sustain the defense. No Appellate Court has yet spoken on the question left open by this Court in *Beacon Brass.*

It is settled that the crime denounced by Section 145(b) is committed when the false return is filed. *Cf. Cave* v. *United States,* 159 F. 2d 464, 467 (8th Cir.); *Myres* v. *U. S.,* 174 F. 2d 329, 334 (8th Cir., 1949); *U. S.* v. *Croesant,* 178 F. 2d 96 (3rd Cir., 1949). In the instant case it is obvious that the charge is actually that Petitioner filed false tax returns for the years 1945-1946. This necessarily follows because if the returns for 1945 and 1946 were correct then no false statements in 1950-1951 could constitute an attempt to evade the taxes for those years. Further, under Counts IV and V the Respondent must prove that the returns for 1945 and 1946 were false and that a tax is owing for those years. Thus, the crux of the charge

is the failure to report income for 1945 and 1946, which acts, if they took place, occurred when the returns for 1945 and 1946 were filed, more than six years prior to the finding of this information. The six years having run, prosecution is barred by the statute of limitations.

In this connection it must be emphasized that the Respondent used exactly the same evidence in its attempt to prove the 1945 and 1946 counts, i.e., the falsity of the returns as it did in its attempt to prove the 1947-8-9 returns, and was not concerned with the falsity of the statements as such. What Respondent thus did was to prosecute for an offense barred by the Statute.

4. Denial of Bill of Particulars:

Motions were made by Petitioner before the trial and at the opening of the trial for a Bill of Particulars. Both motion were denied (*Supra*, p. 6). The Court below held that the claim that these denials were erroneous and prejudicial is without support in the record and states that Petitioner's failure to move for a continuance of the ground of surprise is an affirmative indication that they were not prejudicial. Petitioner contends that the record (pp. 507 to 517) is conclusive as to prejudice and that without the Bill of Particulars it was impossible for him to know what he would have to defend himself against or how he could defend himself. He could never have prepared and was not prepared to answer adequately any of the prosecution charges and neither Petitioner, the Court, nor the jury could determine what theory, what amounts, what years, or what charges Respondent was applying to him.

The holding of the Court below in the instant case is in direct conflict with its decision in *U. S.* v. *O'Connor*, 237 F. 2d 466, which Petitioner contends is on all fours with the case at bar. The decision below is also in direct con-

flict with *Bowman Dairy Co.* v. *U. S.* (1951), 341 U. S. 214, 71 S. Ct. 675, 95 L. Ed. 879, *Fryer* v. *U. S.* (1953) U. S. App. D. C. 34, 207 F. 2 134, Cert. Den. 346 U. S. 885, 74 S. Ct. 135, 98 L. Ed. 389, *Singer* v. *U. S.*, 58 F. (2) 74 (C. C. A. 3rd). In this case the denial of the Bill of Particulars eliminated completely any possibility of a fair trial to Petitioner. The denial, moreover, is amazing, to say the least, in that, in a criminal trial involving the very liberty of Petitioner, the Respondent could examine him before trial by subpoenaing him before the Grand Jury and compelling him to testify against himself and yet in the very same trial, deny him the right to have any information or particulars as to the case against him.

CONCLUSION

For the reasons set forth above this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALBERT I. SCHMALHOLZ,
Attorney for Petitioner,
Office & P. O. Address,
50 Broadway,
New York 4, N. Y.

Appendix A

U. S. Constitution Amendment IV

Searches and Seizures

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Constitution Amendment V

Capital Crimes; Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

26 United States Code (1939 Ed.) Section 145(b)

Any person required under this chapter to collect, account, for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other

penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

26 UNITED STATES CODE, SECTION 3748

Periods of limitation. (a) Criminal prosecutions. No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years,

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner.

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof.

Appendix B

Opinion of United States Court of Appeals for the Second Circuit

No. 217—October Term, 1958.

(Argued January 12-13, 1959 Decided March 30, 1959.)

Docket No. 24137

LUMBARD, Circuit Judge:

The appellant, Sclafani, was convicted on seven counts of an eight count information[1] charging evasion of corporate and personal income taxes under S. 145(b) of the Internal Revenue Code of 1939 for the years 1945-49, and was sentenced to concurrent terms of 15 months on each count and to fines of $5,000 on the first and sixth. Six counts were submitted to the jury on the circumstantial net worth theory and the seventh, charging evasion of personal income tax in 1948, was submitted on the failure to report a specific item of personal income. The appellant has raised seven objections here, which fall into five classes, as follows: (1) that the government failed to prove its net worth case by failing to establish opening net worth and by failing to demonstrate the source of income during the contested years; (2) that his several motions to suppress certain evidence should have been granted since it was obtained from him in the course of

1. The first three counts of the information charged Sclafani with attempting to evade taxes owed by the corporation for 1947, 1948 and 1949 by the filing of false corporate returns. Counts four and five charged him with attempting to evade taxes due from him and his wife for the years 1945 and 1946 by making and filing false and fraudulent statements of his financial condition with the Treasury Department in 1950 and 1951. Counts six, seven and eight charged him with evading personal income taxes for the years 1947, 1948 and 1949 by filing false returns. Count two was dismissed with the government's consent before the case went to the jury.

an illegal search and seizure; (3) that he was rendered immune from prosecution by virtue of having been ordered to give certain testimony before a Grand Jury investigating his corporations after he was subject to the instant information; (4) that he was prejudicially denied a bill of particulars; (5) that counts four and five, which charged the making of false and fraudulent statements of financial condition to the Treasury Department in an attempt to evade taxes, were time barred. We find that the government's evidence amply supported the submission of the net worth case to the jury; and that appellant's rights before and during trial were not prejudiced. Because the conviction and sentence are sustainable whether or not counts four and five were proper, we need not and do not pass on whether they were time barred. We affirm the conviction.

I—Proof of the government's net worth case: Sclafani claims that the government failed in two essential elements of the proof of its case, in that it (A) failed to prove the lack of a "possible source" of funds in addition to those allowed by the government in the net worth statement it used for the opening date of January 1, 1945, and (B) that it failed to show that such increases in net worth as may have been proved were the result of unreported income to the taxpayer. We find that the government's proof was sufficient as to both aspects of its case. In so doing we have borne "constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." Holland v. United States, 348 U. S. 121, 129 (1954).

(A) Sclafani's claim that the government failed to prove the lack of a possible source of additional funds

held by him on January 1, 1945 is based solely on the government's alleged failure to rebut his uncorroborated claim that he had received a secret cash gift of $125,000 from his father-in-law, Rinelli, in 1938. Sclafani has not previously and does not now claim that the government excluded from opening net worth the funds which he had received from any other source; he does not claim that the government failed to pursue relevant leads advanced by him.

Sclafani first claimed that he had such a secret hoard when he was questioned by Agent Sonkin, who, in 1950 in the course of a routine audit of the 1947 corporate return of Joseph L. Sclafani, Inc. discovered $149,000 of payments by check either directly to Sclafani or to cash. Since the corporate books stated that the payments had been made not to Sclafani but to creditors, Sonkin asked Sclafani for an explanation of the discrepancy. Sclafani claimed that the payments were made to him in repayment for equal sums advanced to the creditors on behalf of the corporation by him personally from a large secret cash hoard in 1946. Against this background he supplied Sonkin with a personal net worth statement for the years 1945-1949 which he subsequently twice amended and which the government claimed, and the jury might have found, was false in almost every material respect. In this statement he included $100,000 of the alleged Rinelli gift of $125,000 as of 1945.

In satisfaction of its burden to establish opening net worth "with reasonable certainty," Holland v. United States, supra at 132, the government rebutted the alleged gift with two related lines of proof. It introduced evidence tending to show that Rinelli who died in 1939, was financially unable to have made such a gift in 1938, and

that Sclafani's conduct had been inconsistent with the possession of such a hoard of cash.

Thus the government showed that neither Rinelli nor Sclafani ever filed a gift tax return for the gift and that although Rinelli died in 1939 within a year of the alleged gift, it was not included in his estate tax return; that although in the 1920's Rinelli concededly had considerable wealth, his annual income from 1928 onward was nominal or offset by losses; that the two Rinelli bank accounts found by the government showed small balances and no significant withdrawals from 1934 through 1939; that when Rinelli's once prosperous ship cleaning business was liquidated in 1933 its assets were practically worthless; that his real estate holdings were disposed of partly by gift prior to the alleged gift to Sclafani; that valuable property operated by Rinelli and held by him subject to a mortgage was taken by foreclosure proceedings in 1935, and that, prior to those proceedings, when the bank offered a low interest rate to allow Rinelli to continue the operation of the property, his reply was to the effect that his financial position prevented him from accepting the offer; that Rinelli mortgaged his home in 1932 for $15,000 at 6% interest and that the mortgage was not paid off at the time of his death; that other property was sold at foreclosure proceedings in 1936; that Rinelli was subject to a large deficiency judgments; that a $200,000 insurance trust, which by law was not subject to the claims of his deficiency judgment creditors, was revoked by Rinelli in 1933 "to pay tax s on my different properties" and that substantial loans and interest were first deducted; that Rinelli lived "well" during the depression though he had no apparent source of income after 1929; that Rinelli died less than one year after the alleged gift, leaving his widow apparently without substantial funds.

Appendix B

As to Selafani the evidence showed that he had never claimed to have received such a gift prior to the investigation; that between 1938 and 1945 he borrowed small amounts from banks on several occasions although he claims the alleged gift was then in his possession and through most of the period was uninvested; that, although he said that he had not used the gift in his business because it was a condition of the gift that it not be so used, the only use he now claims to have made of it was in his business after allegedly not having made any substantial use of it at all for about seven years; that he discounted his customers' acceptances at 6% and rediscounted them with banks for 5% to make a 1% profit despite his alleged possession of sufficient cash to handle the discount himself and retain the full 6%; that in summaries of his financial position made to banks for the purpose of securing loans in 1946, 1947, and 1949 the highest amount of cash claimed by Selafani was under $3,000; that Rinelli did not make similar gifts to other relatives; that the gift was allegedly made secretly and in cash; that it was never at any time banked or invested but was allegedly retained in a closet safe. Moreover no witness was produced to confirm the existence of the money in Selafani's possession. Indeed the only evidence in support of the gift is that of Selafani himself.

This evidence is sufficient to sustain the government's burden of establishing opening net worth with reasonable certainty. The only lead furnished the government as a possible source of additional net worth on the opening date was the alleged Rinelli gift, and this was exhaustively investigated. Although standing alone it may have constituted a reasonable explanation by the taxpayer inconsistent with this guilt, see Holland v. United States, supra at 135, on this evidence the jury was justified in finding that the gift was never made.

Appendix B

Moreover, the government's evidence was sufficient to prove the crimes even if, as he claimed, Sclafani held a secret hoard of $100,000 in 1945. The increases in net worth independently proved by the government for th subject years were:

1945	$84,228.42
1946	39,835.08
1947	80,458.07
1948	(no demonstrable excess)
1949	23,109.27

Even if as he claimed Sclafani employed $30,000 of a concealed fund in 1945, and $70,000 in 1947, there remains a substantial unexplained excess of the yearly increases in net worth independently proved by the government and the defendant's own testimony as to his cash and other resources. Such a discrepancy in the defendant's own testimony and financial reports amounting to about $130,000 of unexplained increase in net worth through the prosecution period is highly persuasive of guilt. "There could hardly be more conclusive independent evidence of the crime * * *. While the evidence as a whole must show a deficiency for each of the prosecution years, the corroborative evidence suffices if it shows a substantial deficiency for the over-all prosecution period." United States v. Calderon, 348 U. S. 160, 167, 168 (1954).

(B) As to proof that net worth increases resulted from unreported income, it is well established that the government need not prove the specific source of proved increases in net worth in order to demonstrate their tax character as income; it is sufficient for it to prove "a likely source from which the jury could reasonably find that the net worth increases sprang." Holland v. United States, supra at 138.

Appendix B

The government introduced proof that Joseph L. Sclafani, Inc. was the source of the net worth increases. It showed: (1) that $50,000 of loans made earlier by the corporation to others was repaid to Sclafani personally in 1946; (2) that the corporation paid Sclafani $149,000 by checks payable to him or to cash in 1947; (3) that Sclafani purchased with corporate funds $35,000 worth of securities which he held personally; and (4) that throughout the prosecution period more than $250,000 of corporate funds were commingled with funds in Sclafani's personal accounts. This proof was sufficient to entitle the jury to find that Joseph L. Sclafani, Inc. was the likely source of the net worth increases.

Sclafani apparently does not deny that the jury could have found that he diverted the repayment of corporate loans to himself in 1946. He sought to explain the $149,000 of payments to himself in 1947 by claiming that they were made in return for sums advanced by him to creditors on behalf of the corporation in 1946, but the government produced evidence in the form of bank photostats of corporate checks that $45,577.91 of payments claimed to be of this nature had previously been paid by the corporation directly to the creditors, and Sclafani failed to produce corporate or personal records adequate to verify his claim that the payments were made by him.

The commingling of corporate and personal funds was explained by Sclafani as the product of a check cashing service he rendered in his capacity as salesman for the corporation. He claimed that he cashed the retail customers' checks even when they were in an amount well in excess of the wholesale purchase and that in one way or another the corporation received all receipts properly owing to it. Although it appears that some investigation

by the government failed to reveal specific cases of retention by Sclafani in 1949 of corporate receipts commingled with his personal funds, this is by no means fatal to the government's case. Sclafani's misrepresentations on the corporate books and diversions of other corporate funds are sufficient to raise an inference that the books did not accurately reflect the receipts and disbursements of the corporation. Since an inference of the existence of taxable income may be drawn from the proof of increases in net worth greatly in excess of reported income, Johnson v. United States, 319 U. S. 503, 517 (1943), there was sufficient evidence for the jury to find that there was taxable income unreported and that its likely source was Joseph L. Sclafani, Inc.

Moreover, apart from the alleged gift, the taxpayer admitted that he had no other source of non-taxable income, and the government's prolonged investigation, though it revealed assets concealed by the taxpayer, did not disclose any other reasonably likely non-taxable source. United States v. Massei, 355 U. S. 595 (1938) holds that that as an alternative to proof of a "likely source" for the proved increases in a net worth case the government would succeed "should all possible sources of non-taxable income be negatived • • •."

II—Search and seizure. Sclafani contends that the net worth statements and other records, obtained from him after the "routine audit" commenced by Agent Sonkin had been referred to the tax fraud division of the Internal Revenue Service and Special Agent Silbert had begun to participate in the case, were obtained through stealth and deceit, through what had automatically become an unconsented search, and therefore ought to have been suppressed upon his timely motion at trial. We agree with

the district court that Sclafani's consent was not procured by stealth or deceit, and that it was sufficient to justify the search the agents made.

The undisputed facts are as follows: On May 26, 1950, Agent Sonkin, in pursuance of his duty (as he testified) "to go out and make audits of returns assigned for investigation" visited the offices of Joseph L. Sclafani, Inc., to make what he truthfully told Sclafani was to be a "routine audit" of the corporation's 1947 income tax return, and received Sclafani's permission to examine the relevant books and records for this purpose. As a result of the subsequent discovery of the discrepancies (discussed, supra) between the corporate books and certain corporate checks, Sonkin had several subsequent conversations with Sclafani, and finally asked him to submit a net worth statement for the years 1945-1949, which Sclafani did about June 22, 1950.

Thereafter, Agent Sonkin's superiors called the investigation to the attention of the tax frauds section of the Intelligence Division, and Silbert was assigned to the case. Silbert's full title is, as he testified, "special Agent (Criminal Investigator)." On August 18, 1950 Sonkin called Sclafani to make a further appointment, and Sonkin and Silbert visited Sclafani together later that day. According to Sclafani, Sonkin did not disclose on the phone that Silbert would accompany him; and although Sclafani was introduced to "Special Agent Silbert" neither agent informed him as to Silbert's special duties. Silbert asked Sclafani several questions from a typewritten list he brought with him, and thereafter requested that Sclafani file a new net worth statement, which Sclafani prepared that day.

Appendix B

Sclafani now contends that "the prosecution's case thus establishes that at the time Silbert obtained this data a criminal prosecution was at least a possibility so far as the Bureau was concerned," and that since Sclafani was not notified that the investigation was "no longer routine" his earlier consent was ineffective to authorize the continuance of the search without a warrant.

Sclafani does not deny that all the information he gave to those agents was freely and voluntarily given. He claims, however, that his consent to the searches incident to the investigation was limited to an investigation for "civil" purposes, and that when, without disclosing their altered purpose to him, Agent Sonkin and his superiors brought in a "criminal" investigator, the original consent was exceeded, and the search and seizures were in violation of his rights under the Fourth Amendment.

Several cases appear to have held that the failure to disclose that a once "routine" tax investigation, for which consent was procured, has grown into one to discover whether a crime has been committed, renders the subsequent entries fraudulent and infects the accompanying search. See, e.g., Matter of Bodkin, 165 F. Supp. 25 (E. D. N. Y. 1958); United States v. Lipschitz, 117 F. Supp. 466 (E. D. N. Y. 1954); United States v. Guerrina, 112 F. Supp. 528 (E. D. Pa. 1953); Cf. United States v. Wolfich, 129 F. Supp. 528 (S. D. N. Y. 1955). We think that the reliance of these cases on the rule of Gouled v. United States, 255 U. S. 298 (1921) is misplaced, and that in circumstances such as those the failure to disclose the changing course of the investigation is not fraudulent or deceitful. See Turner v. United States, 222 F. 2d 926 (4 Cir. 1955) and cases cited.

Appendix B

A "routine" tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission.

> "Surely defendant was aware that, if a 'routine audit' revealed evidence of criminal liability, the agent would not ignore it merely because he was primarily concerned with civil liability. * * * A statement that the purpose of an investigation is a 'routine audit' is not the equivalent of a promise that only civil liability will be considered regardless of what the examination reveals. Nor would any accountant or businessman so understand it." United States v. Wolrich, 119 F. Supp. 538, 540 (S. D. N. Y. 1954) (Dimock, J.).

Moreover it is unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead. The burden on the government would be impossible to discharge in fact, and would serve no useful purpose.

The Fourth Amendment does not require more than this, that when his consent is sought the taxpayer be apprised of the government's concern with the accuracy of his reports, and therefore of such hazards as may be incident to a voluntary disclosure. We hold that Selafani was so apprised by the warning inherent in the request when Agent Sonkin identified himself and disclosed his purpose to audit certain returns of the corporation.

Of course the government's agents may not act so as to obscure the warning inherent in their request for per-

mission to search, as by assuring the taxpayer, in order to quiet his apprehensions, that no proceedings can or even will eventuate, and then rely successfully on the consent so procured. Cf., Shapiro v. United States, 335 U. S. 1 (1948). This is the rule of Gouled v. United States, supra. But no such deception is inherent in Agent Sonkin's concededly truthful description of his purpose as a "routine audit," and nothing appears of record to suggest that the acts of the agents obscured the potential scope of such an inquiry so as to render this description misleading to Sclafani. Since therefore Sclafani's original permission was freely given in response to a fair and accurate warning of the government's concern with his compliance with the tax laws, it sufficed to authorize what followed, and Judge Foley properly denied the motions to suppress.

III—Grand Jury. After the information in this case had been filed against Sclafani pursuant to his waiver of indictment, he was summoned as a corporate officer to appear befor a Grand Jury investigating the corporation, Joseph L. Sclafani, Inc. in order to produce and identify corporate books and records and to explain the absence or reveal the whereabouts of any such records not produced. Over his objection on grounds of the Fifth Amendment, Sclafani was compelled to comply. Based on these proceedings he now asserts two reasons why his conviction must be reversed. First, he maintains that the proceeding to investigate the corporation was instituted by the United States Attorney solely in order to prepare for trial of the case against him personally, and that therefore certain evidence used at trial which was allegedly procured from him through the Grand Jury should have been suppressed. Second, he maintains that in any event

because he was allegedly questioned before the Grand Jury as to personal as well as corporate records his privilege under the Fifth Amendment not to incriminate himself was infringed, as a result of which the information against him should have been dismissed, or at least the evidence allegedly so obtained should have been suppressed.

At the outset this case must be distinguished from cases such as United States v. Lawn, 115 F. Supp. 674 (S. D. N. Y. 1953) and In re Fried, 161 F. 2d 453 (2 Cir. 1947) in which indictments were quashed because the rights of the defendant had been infringed by the Grand Jury proceedings which gave rise to them. In such cases the defendant's independent interest in not being subject to a public charge of crime which was improperly procured is the basis of reversal. Here, however, the defendant voluntarily surrendered the protection of a Grand Jury proceeding against himself by his waiver of indictment and he does not challenge the fairness of that waiver. The charge of crime having been made in a manner which is concededly proper, a subsequent misuse of Grand Jury proceedings by the United States Attorney, assuming that it was such, could be the basis of a reversal of this conviction only to the extent that the fruits of the abuse were employed in securing it, so as to deprive the defendant of a hearing which comports with the requirements of the due process clause of the Fifth Amendment. See Lawn v. United States, 355 U. S. 339 (1958). The only question presented by Sclafani's contentions is therefore whether any evidence used by the government at trial was obtained by it at or through an abuse of the Grand Jury Proceeding.

We hold that regardless of the correctness of the defendant's claim of abuse, there is no proof that any evi-

dence used by the government at the trial was obtained by it at or through the Grand Jury Proceedings, and consequently there was nothing which ought to have been suppressed.

On July 23 and 26, 1954 subpoenas duces tecum and ad testificandum were served on Sclafani in his corporate capacity to produce corporate books and records and to testify as to their location if they were not produced. On the return day he refused to testify, claiming his constitutional privilege against self-incrimination, but he was thereafter ordered by Judge Bruchhausen on July 29, 1954 to answer questions relating to the identification and authentication of the books and records of the corporation, which were to be produced pursuant to the subpoena duces tecum, and to explain the absence or reveal the whereabouts of those not produced. Sclafani was clearly apprised of the limits of this order both by his counsel in advance of the hearing, and by the United States Attorney who conducted the inquiry before the Grand Jury, and was repeatedly advised to refuse to answer questions which he regarded as having been put to him in his personal capacity.

Subsequent to his compliance with his order Sclafani moved before Judge Rayfiel to dismiss the information previously filed against him on the ground that these events deprived him of constitutional guarantees against self-incrimination and therefor infected the information. Judge Rayfiel denied the motion on the merits of the claimed abuses holding that Sclafani was amply warned of his constitutional rights, and that he "has failed completely to show that his constitutional rights and privileges have been violated or that there was any impropriety in the proceedings leading up to the filing of the informa-

tion." 126 F. Supp. 654 (S. D. N. Y. 1954). During trial the matter was reopened before Judge Foley who, after inspection of the relevant Grand Jury minutes, declined to alter Judge Rayfiel's determination.

Even if we were now to assume both that the government proceeded before the Grand Jury, as Selafani alleges, in order to prepare for trial of the case against him, and that such use of the Grand Jury was inconsistent with the guarantees implicit in the Federal Rules of Criminal Procedure or the Fifth Amendment, our result would be the same, since no injury resulted from the alleged abuse.

From the trial testimony of Selafani and the investigating agents, it is clear that the concededly corporate records which Selafani produced under the Grand Jury subpoena and which he identified as corporate records had been given to the agents long before the Grand Jury proceedings were undertaken. Selafani does not now claim that any information as to them was obtained from him through the Grand Jury, or that information so obtained was used at the trial or in preparation for it.

It is similarly uncontested that the allegedly non-corporate records used at trial and with which Selafani was confronted before the Grand Jury were in the possession of the government long before that proceeding was commenced. Selafani contends, however, that testimony as to these records was wrongly compelled over his claim of privilege at the Grand Jury and was used against him at trial.

When the records were presented to him at the Grand Jury, Selafani was cautioned by the United States Attorney that if the records were not corporate records he might claim his privilege against self-incrimination and refuse to identify them. Selafani nevertheless exclaimed

that the records were "personal" and that letters were "addressed to me" and refused to testify further as to them. He now appears to assert that the government made use of this testimony at trial. The opposite appears plainly from the record, however. The government, far from contending that these exhibits were personal records of Sclafani, completely ignored his contention and asserted that they were records of corporate transactions, offering them as a link in the chain of proof that Sclafani had diverted the repayment of certain corporate loans to himself. Therefore even if we assume that Sclafani's claim of privilege was preserved despite his exclamation, see, United States v. Weisman, 111 F. 2d 260 (2 Cir. 1940), there is no evidence that his testimony before the Grand Jury affected the conduct of his trial.

Because it thus appears that even if Judge Bruchhausen, by requiring Sclafani to identify corporate records other than those whih he himself produced pursuant to the subpoena, improperly overruled his claim of privilege, the error did not affect this conviction, we need not inquire here into the extent to which the corporate record doctrine licenses such compulsion. Cf. Curcio v. United States, 354 U. S. 118, 125 and n. 4 (1957).[2]

IV—Sclafani's remaining claims may be disposed of briefly. It is unnecessary to consider at all the claims of error directed to counts four and five, the false statement counts, since the sentences imposed on all counts were equal and concurrent, and since no fine was imposed on count four or five. Lawn v. United States, 355 U. S. 339 (1958); Hirabayashi v. United States, 320 U. S. 81 (1943); United States v. La Novara, 192 F. 2d 259 (2 Cir. 1951).

2. The same reasoning applies to any violations of the Curcio rule which might have occurred.

Appendix B

The claim that the trial court's denial of a bill of particulars was erroneous and prejudicial is without support in the record. It appears that the defendant was amply provided with a summary of the government's case and was allowed a reasonable opportunity to examine its exhibits in the course of trial. No such surprise or injury as would justify a holding that the trial court had so abused its discretion as to require reversal of the conviction has been shown, see Wong Tai v. United States, 273 U. S. 77 (1927), whereas the appellant's failure to move for a continuance on the ground of surprise is an affirmative indication that in any event it was not prejudicial. Schine v. United States, 209 F. 2d 67 (9 Cir. 1953), cert. denied, 347 U. S. 937 (1954).

Appellant's claims of prejudicial confusion in the trial, which he predicates upon our opinion in United States v. O'Connor, 237 F. 2d 466 (2 Cir. 1956) are not supported by the record, and are for the most part restatements of his contention that he was improperly denied a bill of particulars. His additional claims that the government introduced a large mass of confusing evidence and exhibits not directly related to the proof of net worth is insubstantial since the evidence pertained primarily to a rebuttal of the defendant's own claim that he had received a substantial cash gift from Rinelli. Cf. United States v. Novick, 124 F. 2d 107 (2 Cir. 1941). Finally, the trial court's charge assisted in the clarification of the issues, and was consistent with the criteria we set forth in the O'Connor case.

The conviction is affirmed.

Appendix B

OPINION OF UNITED STATES DISTRICT COURT, EASTERN DISTRICT, NEW YORK, DECEMBER 29, 1954

RAYFIEL, District Judge.

On February 26, 1954, an eight-count information was filed against the defendant. The first three counts charge him, as president of Joseph L. Sclafani, Inc., a corporation, with wilfully and knowingly attempting to evade the payment of part of its income taxes for the years 1947 to 1949, inclusive, by filing with the Collector of Internal Revenue *false and fraudulent tax returns for the said* years. Counts 6 to 8, inclusive, charge him, a married man, with wilfully and knowingly attempting to evade the payment of part of the income taxes due from him and his wife for the years 1947 to 1949, inclusive, by filing with the Collector of Internal Revenue false and fraudulent income tax returns for himself and his wife for the said years. Counts 4 and 5 charge that on or about, and between June 21, 1950, and January 12, 1951, the defendant, a married man, wilfully and knowingly attempted to defeat and evade a part of the income taxes due from him and his wife for the years 1945 and 1946, respectively, by making, filing and causing to be filed with representatives of the United States Treasury Department certain false and fraudulent statements for the purpose of concealing additional unreported income.

On July 23, 1954, a subpoena duces tecum was served upon the defendant, directing him to appear before a Grand Jury and to bring certain books and records of the aforementioned corporation with him. On July 26, 1954, another subpoena was served upon him, directing him to appear before the said Grand Jury to give oral testimony relating to the affairs of the said corporation. Both sub-

poenas were returnable July 27, 1954, on which day the defendant appeared but declined to testify, claiming his constitutional privilege. On July 29th Judge Bruchhausen ordered him to appear and testify before the Grand Jury to the extent hereinafter indicated.

The defendant has moved before this Court for the following relief:—

(1) to dismiss the information on the ground that his constitutional rights have been infringed.

(2) to dismiss counts 4 and 5 of the *information on the* ground that prosecution thereunder is barred by the Statute of Limitations.

[1] Judge Bruchhausen's aforementioned order of July 29th, 1954, directed the defendant, as an officer of Joseph L. Selafani, Inc., to answer questions relating to the identification and authentication of the books and records of the said corporation, which were to be produced pursuant to the subpoena duces tecum, and to explain the absence or reveal the whereabouts of those not produced. That the defendant was clearly obliged to do on the authority of Wilson v. United States, 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771, and United States v. Field, 2 Cir., 193 F. 2d 92, certiorari denied 342 U. S. 894, 72 S. Ct. 202, 96 L. Ed. 670.

[2] Submitted in support of the first motion was the affidavit of Anthony A. Marcelle, Esq., his attorney, verified the 18th day of October, 1954. Nowhere in the affidavit does it appear that the defendant's constitutional rights were invaded. Nowhere is the claim made that the defendant was compelled or even asked to answer any question which constituted a deprivation of his consti-

tutional privilege against self-incrimination. As a matter of fact the affidavit states that *prior* to the defendant's appearance before the Grand Jury the affiant expressly "advised Mr. Sclafani that since there were criminal proceedings pending in this Court against him individually, he should refuse to testify and to answer any of the questions put to him before the Grand Jury on the ground that he might incriminate himself." No indictment has been returned against the defendant or the said corporation as the result of his testimony before the said Grand Jury. The defendant has failed completely to show that his constitutional rights and privileges have been violated or that there was any impropriety in the proceedings leading up to the filing of the information. As a matter of fact the information was filed with his consent; it could not be filed without it.

[3] The defendant has asked also for leave to inspect the Grand Jury Minutes. Such motions are rarely granted, and then only when the defendant has met his burden of showing clearly that he is entitled to such inspection. This the defendant, as hereinabove indicated, has utterly failed to do.

We come now to defendant's motion to dismiss counts 4 and 5 of the information on the ground that prosecution thereunder is barred by the Statute of Limitations, Title 26 U.S. Code, §3748(a).

The tax years 1945 and 1946 are involved in said counts and the returns therefor were filed in March, 1946, and March, 1947, respectively, more than six years prior to the filing of the information, the limitation fixed by subdivision 2 of section 3748(a), supra.

Appendix B

[4] In support of his motion the defendant cites the cases of Guzik v. United States, 7 Cir., 54 F. 2d 618, certiorari denied 285 U. S. 545, 52 S. Ct. 395, 76 L. Ed. 937, Cave v. United States, 8 Cir., 159 F. 2d 464, and United States v. Ehrlich, D.C.E.D.Pa., 104 F. Supp. 223, contending that those cases are controlling since the crimes in said counts alleged were completed in March, 1946, and March, 1947. It is correct to say that prosecution for the alleged crime of attempted evasion of taxes *by the filing of false tax returns*, was outlawed in 1954, but it was possible for the defendant to violate the statute involved in more than one way and on more than one occasion, and that is precisely what the Government accuses the defendant of doing. Counts 4 and 5 of the instant information charge that the defendant attempted to evade the payment of income taxes for the years 1945 and 1946, respectively, by filing or causing to be filed with representatives of the United States Treasury Department between June 21, 1950 and January 12, 1951, certain false and fraudulent statements for the purpose of concealing additional unreported net income for the years therein mentioned.

[5] The case of United States v. Beacon Brass Co., Inc., 344 U. S. 43, 73 S. Ct. 77, 79, 97 L. Ed. 61, appears to be in point. The pertinent facts in that case are substantially similar to those in the instant case, and the Court there said:—"The language of § 145(b) which outlaws willful attempts to evade taxes 'in any manner' is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income."

For the foregoing reasons the defendant's motion is in all respects denied.

FILE COPY

FILED
JUN 10 19
JAMES R. BROWNING

No. 913

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOSEPH L. SCLAFANI, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	8
Conclusion	18

CITATIONS

Cases:

Cobbledick v. *United States*, 309 U. S. 323	11
Gouled v. *United States*, 255 U. S. 298	14, 15
Hanson v. *United States*, 186 F. 2d 61	15
Harvey v. *United States*, 215 F. 2d 330	16
Lawn v. *United States*, 355 U. S. 339	11
Montgomery v. *United States*, 203 F. 2d 887	15
Mulloney v. *United States*, 79 F. 2d 566, certiorari denied, 296 U. S. 658	10, 11
Schino v. *United States*, 209 F. 2d 67, certiorari denied, 347 U. S. 937	17
Stanley v. *United States*, 245 F. 2d 427	16
Turner v. *United States*, 222 F. 2d 926	15
United States v. *Beacon Brass Co.*, 344 U. S. 43	16
United States v. *Frank*, 245 F. 2d 284	15
United States v. *Lawn*, 115 F. Supp. 674, appeal dismissed *sub nom. United States* v. *Roth*, 208 F. 2d 467	10, 11
United States v. *Monia*, 317 U. S. 424	10
United States v. *O'Connor*, 237 F. 2d 466	16, 17
United States v. *Werner*, 160 F. 2d 438	16
Wilson v. *United States*, 162 U. S. 613	16
Wilson v. *United States*, 221 U. S. 361	9, 11-12

Statutes:

Internal Revenue Code of 1939:	
Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145 (b))	2-3, 16
Sec. 3748 (26 U.S.C. 1952 ed., Sec. 3748)	16

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 7	3

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 913

JOSEPH L. SCLAFANI, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 19-35) is not yet reported. The opinion of the District Court, denying petitioner's pre-trial motions to dismiss the information and to dismiss certain counts thereof (Pet. 36-39), is reported at 126 F. Supp. 654.

JURISDICTION

The judgment of the Court of Appeals was entered on March 30, 1959 (Pet. 19), and on April 30, 1959, the time for filing a petition for a writ of certiorari

was extended to May 14, 1959, by order of Mr. Justice Harlan. The petition was filed on May 12, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the information should have been dismissed because, after it was filed, petitioner was required to testify before a grand jury in response to subpoenas calling for (a) the production of corporate records and (b) testimony relating to those records.

2. Whether statements purporting to set forth petitioner's net worth, which he submitted to the Treasury agents near the beginning of the investigation, should have been excluded from evidence because the agents had not advised him that he might be prosecuted criminally.

3. Whether prosecution on Counts IV and V of the information was barred by the statute of limitations.

4. Whether petitioner was prejudiced by the District Court's denial of his motion for a bill of particulars.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chap-

ter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b)).

STATEMENT

On February 26, 1954, there was filed against petitioner in the United States District Court for the Eastern District of New York an eight-count information[1] alleging that he had wilfully attempted to evade substantial parts of (1) his individual income taxes for the years 1945 through 1949, and (2) the income taxes of Joseph L. Sclafani, Inc., for the years 1947 through 1949. (R. 2819-2824.)[2] On February 7, 1955, petitioner entered pleas of guilty to Count III (evasion of the corporation's 1949 tax) and Count VI (evasion of petitioner's 1947 tax). (R. 2866.) In accordance with a previous understanding, petitioner's representatives were then furnished with

[1] The petitioner waived indictment under Rule 7(b) of the Federal Rules of Criminal Procedure. (R. 2826.)

[2] The record in this case consists of three pages covering the District Court's docket entries, lettered A, B and C, and a typewritten transcript of the trial and pre-trial proceedings, with pages numbered 1 through 2887.

a copy of the revenue agent's report, which disclosed petitioner's net income and tax deficiencies, as reconstructed by the Government, in detail. (R. 1508, 2866-2867.) Thereafter, on March 10, 1955, petitioner withdrew his plea of guilty, with the consent of the court, and entered a plea of not guilty. (R. B.)

After a jury trial lasting six weeks, petitioner was found guilty on all counts except Count II (involving the alleged attempted evasion of the corporation's 1948 taxes), which was dismissed by the court during the trial. (R. 2686, 2799-2800.) On April 27, 1955, petitioner was fined $5,000 on Count I and $5,000 on Count VI, and sentenced to concurrent 15-months prison terms on all seven counts on which he had been convicted. (R. 2815-2816, 2883.)

The Government's proof, which was based on the net worth-expenditures method, bolstered by proof of specific items of unreported income, showed that the true income and tax liability of petitioner and Joseph L. Sclafani, Inc., during the prosecution years compared with the amounts reported on the tax returns as follows (Govt. Exs. 358, 358A, 381, 389):

Year	Net Income		Tax Liability	
Petitioner	Reported	Corrected	Reported	Corrected
1945	$ 2,980.89	$ 53,547.02	$ 255.60	$28,194.69
1946	3,363.29	36,542.38	259.03	14,681.04
1947	3,152.19	68,019.23	218.92	33,699.05
1948	4,342.49	5,303.67	322.46	482.02
1949	4,159.44	27,268.71	292.06	6,272.72
	$17,998.30	$190,681.01	$1,348.07	$83,329.52
Joseph L. Sclafani, Inc.				
1947	$ 2,921.43	$ 78,851.43	$ 613.50	$29,963.54
1949	4,884.90	25,616.58	1,025.83	6,076.79
	$ 7,806.33	$104,468.01	$1,639.33	$36,040.33

During the years in question all of the stock of the corporation (which was engaged in the wholesale grocery business) was owned by petitioner and members of his family, petitioner being the largest single stockholder. (R. 1430.) Although petitioner was the president and operating head of the business, he listed his occupation on his individual income tax returns as "Salesman" or Travelling Salesman". (Govt. Exs. 1-5, 8-12.)

In 1950, an internal revenue agent assigned to make a routine audit of the corporation's 1947 return discovered disbursements totalling $149,000 on the corporate books, which ostensibly reflected payments to suppliers of merchandise, but in fact represented funds paid over to petitioner. (R. 110-112,

117-119.)[3] All of the checks making up the $149,000 were either cashed by petitioner, deposited to petitioner's personal bank accounts, or redeposited in the corporation's bank account and credited as loans payable to petitioner. (R. 123-126.) The Treasury agent took the matter up with petitioner, who explained that he was simply reimbursing himself for personal funds he had advanced to the corporation in 1946 to pay for merchandise purchased in that year.[4] (R. 130, 133.) The agent asked petitioner where he had obtained such a large sum of money to advance to the corporation, and petitioner explained that he had received a gift of $125,000 in currency from his father-in-law, Peter Rinelli, in 1938. (R. 128.) Rinelli had died in 1939. (R. 1384.)

After discussing the situation with his superior in the Internal Revenue Service, the revenue agent asked petitioner for a net worth statement to substantiate his contention. (R. 148.) Petitioner completed the blank net worth schedule which the agent had furnished him, signed and swore to it, and filed it with the Internal Revenue Service in June, 1950. (R. 1189, 1211-1212, 2196-2198; Govt. Ex. 22.) During the ensuing months petitioner was given at least two opportunities to correct any mistakes and supply any omissions, but with two insignificant exceptions he adhered to the position that it was a

---

[3] During the years 1945 through 1949, the corporation declared no formal dividends. (Govt. Exs. 8-12.)

[4] The corporation's canceled checks for 1946 and its cash receipts and disbursements book for 1946 were never shown to the agents. (R. 1250, 1290.)

true and correct statement. (R. 1171, 1174-1179, 1183, 1230, 1246-1247; Govt. Ex. 22a.)

After a special agent had been called into the case to collaborate with the revenue agent, petitioner repeated and elaborated upon the contention that he had received a $125,000 cash gift from his father-in-law. (R. 1170-1171, 1230-1232, 1243.) The Government introduced evidence tending to show that no such gift could possibly have been made. (R. 1240-1243, 1380-1386, 1390-1399, 1410-1424.) As for the net worth statement submitted by petitioner, which he swore was "true and complete in every respect" (Govt. Ex. 22), the Government proved conclusively that it omitted substantial assets. The statement listed accounts in two banks; the agents discovered undisclosed accounts in five other banks. The statement listed investments in three businesses; the agents discovered investments in two other businesses, as well as a $5,500 investment, also undisclosed, in a mortgage, and lesser amounts invested in common stocks. The statement disclosed $12,000 invested in Government bonds; the agents unearthed a total investment (as of the end of 1948) in such bonds of $63,793.75. The statement disclosed four life insurance policies; the agents discovered eleven additional policies. (R. 1252-1253, 1367-1379; Govt. Ex. 344.) Petitioner's statement showed a decrease in his net worth between the end of 1944 and the end of 1948. (Govt. Ex. 22, 22a.) The Government's proof showed an increase in excess of $200,000. (Govt. Ex. 358.) After the special agent told petitioner that he had discovered these additional

assets, petitioner agreed, in the presence of his attorneys, to furnish a list of them, but never did so. (R. 1272-1275.)

ARGUMENT

1. Petitioner contends (Pet. 7-11) that his conviction must be reversed because he obtained immunity from prosecution when he was compelled, after the information had been filed against him, to produce and identify before the grand jury certain corporate books and records, and to explain the absence of any such records not produced. The point is without merit. The facts are as follows: Defendant moved in the District Court to dismiss the information, attaching an affidavit by his attorney which alleged that on July 23, 1954, petitioner was served with a *subpoena duces tecum* requiring him to appear before a federal grand jury sitting in the district, and to bring with him certain books and records of Joseph L. Sclafani, Inc., pertaining to transactions of that corporation for the years 1943 through 1949; that, three days later, petitioner was served with a *subpoena ad testificandum*, returnable on the same date as the *subpoena duces tecum;* that the affiant advised petitioner to refuse to answer any questions whatsoever on the ground that he might incriminate himself; that, when petitioner followed this advice, he was taken before Judge Bruchhausen, who ordered him to answer the particular questions put to him because "no claim of privilege under the Fifth Amendment is substantiated with respect to the questions pertaining to the

production of these books, their authentication and identification, and the questions as to the missing corporate books and records" (R. 2845); and that petitioner was thereafter questioned before the grand jury on July 29, 1954, and July 30, 1954 (R. 2841-2846).[5] The District Court (Rayfiel, J.) held that petitioner had been "clearly obliged" to comply with Judge Bruchhausen's order by *Wilson* v. *United States*, 221 U. S. 361 (Pet. 37); that nowhere in the moving papers was any claim made that petitioner "was compelled or even asked to answer any question which constituted a deprivation of his constitutional privilege against self-incrimination" (Pet. 37-38); and that petitioner had failed completely to show any violation of his rights or any impropriety in the proceedings leading to the filing of the information. (Pet. 38.) The Court of Appeals, scrutinizing the trial record, held that in any event petitioner has no valid complaint because "no injury resulted from the alleged abuse." (Pet. 33.)[6]

Petitioner urges reversal on two theories: (a) that the prosecutor abused the grand jury process by questioning petitioner before that body while criminal charges were pending against him; and (b) that petitioner's testimony before the grand jury re-

---

[5] As petitioner points out (Pet. 8, fn. 3), the transcript of his testimony before the grand jury was marked as Court's Exhibit I for possible use by the appellate courts. We have lodged it with the Clerk of this Court.

[6] The Court of Appeals discussed the factual situation in detail. (Pet. 30-34.)

lating to Government's Exhibits 366 and 367 was used against him at the trial.

(a) Immunity from prosecution, at least in the federal system, can be conferred only by statute (cf. *United States* v. *Monia*, 317 U. S. 424); none of the authorities cited by petitioner (Pet. 11, fn. 5) supports his thesis that he acquired immunity when he testified before the grand jury.

Petitioner's main reliance is upon *Mulloney* v. *United States*, 79 F. 2d 566, 579 (C. A. 1st), certiorari denied, 296 U.S. 658, and *United States* v. *Lawn*, 115 F. Supp. 674, (S.D. N.Y.), appeal dismissed as untimely *sub nom. United States* v. *Roth*, 208 F. 2d 467 (C. A. 2d). The asserted conflict (Pet. 8) between the instant case and the *Mulloney* case does not exist. It is not correct to say, as petitioner does, that in *Mulloney* the First Circuit "adopted the lower Court's charge to the Jury" (Pet. 8), for all it did was to quote from the charge (79 F. 2d at 578-579)[1] and then observe (p. 580) that "in some

[1] In the portion of the charge relied upon by petitioner the trial judge was rambling far from the facts of that case and gratuitously discussing a hypothetical situation: "If Mr. Mulloney had been a party when he was called as a witness, if, for instance, a complaint and warrant had been issued against him and he was under bail to await the action of the grand jury, and after he had been called and sworn he had been asked how old he was, or how much he weighed or any inconsequential question and he had been compelled to answer, it would have been a violation of his rights then and there, and *any indictment against him would have been void.* * * * But here, where an investigation had not then resulted in a criminal prosecution against any one, certain questions could be asked without infringing his Con-

respects it was too favorable to the defendant, but of this he cannot complain." Nothing said by the First Circuit in *Mulloney* is out of harmony with the case at bar, and to the extent that the remarks of the trial judge there may be of comfort to petitioner, they are distinguishable on precisely the same ground as the Court of Appeals here distinguished *United States* v. *Lawn*, *supra*, *i.e.*, that "In such cases the defendant's independent interest in not being subject to a public charge of crime which was improperly procured is the basis of reversal. Here, however, the defendant voluntarily surrendered the protection of a Grand Jury proceeding against himself by his waiver of indictment and he does not challenge the fairness of that waiver." (Pet. 31.) In short, whatever vitality *United States* v. *Lawn*, *supra*, may retain in light of *Lawn* v. *United States*, 355 U. S. 339, 349 (see fn. 7, *supra*), petitioner can have no valid complaint here because the grand jury did not indict him.[8]

---

stitutional rights, depending upon whether or not his answers would be injurious to him." (Emphasis supplied.) *Mulloney* v. *United States*, 79 F. 2d 566, 579, (C.A. 1st). This is not the law. An indictment returned by a legally constituted, unbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits. *Lawn* v. *United States*, 355 U. S. 339, 349, and cases cited.

[8] If petitioner was of the opinion that the Government was abusing the processes of the grand jury by calling him to produce documents and testify, he should have moved to quash the subpoena (cf. *Cobbledick* v. *United States*, 309 U. S. 323), though any such effort would seem to have been doomed to failure, corporate documents being involved (*Wil-*

(b) Equally without merit is the due process argument (Pet. 10) that the Government improperly introduced into evidence Government's Exhibits 366 and 367, and commented on petitioner's testimony before the grand jury with respect to them.[9] Those documents, consisting of two receipts signed by one Zerillo for monies advanced to him by the corporation (R. 1517-1528, 2034-2035), are plainly corporate records and hence not within the scope of the privilege against self-incrimination. Moreover, they were voluntarily turned over to the Treasury agents by petitioner near the beginning of the investigation, years before the grand jury proceedings. (R. 1520, 1521, 1522, 1526-1528; Govt. Ex. 22.) Petitioner complains (Pet. 10) that he was "questioned before the Grand Jury" about these exhibits, but fails to add that he refused to answer the questions (contending that the receipts were personal in nature) and that the Government attorney then discontinued such questions (R. 2031-2033, 2038-2039).[10]

---

son v. *United States*, 221 U. S. 361). Moreover, for all that appears the grand jury may have been engaged not in assisting the prosecutor in preparing for trial, as petitioner surmises, but in considering the advisability of indicting other persons who may have been implicated in the large-scale tax fraud shown here.

[9] These are the only specific contentions petitioner makes with respect to improper use of evidence at the trial.

[10] But, says petitioner (Pet. 10), the very fact that he claimed before the grand jury that the receipts constituted personal records was commented upon by the prosecutor at the trial. This appears to refer to the statement made in the course of the Government's summation to the jury that

2. Petitioner urges (Pet. 11-13) that the net worth statement (Govt. Ex. 22) and other records [11] he gave the Treasury agents near the beginning of the investigation should have been suppressed because they were obtained by deceit (and hence by illegal search and seizure) in that the agents failed to advise him that the case was assuming a criminal aspect. The contention is without substance. The pertinent facts are as follows: In May, 1950, Internal Revenue Agent Sonkin, having been assigned to audit the 1947 tax return of the corporation, called petitioner for an appointment. He advised petitioner of his purpose and received his permission to examine the relevant books and records. Sonkin soon discovered the $149,000 of corporate checks ostensibly paid to suppliers of merchandise but actually diverted to petitioner's own use or credited to him as loans on the corporate books.

---

petitioner claimed those advances of funds to be "personal assets". (R. 2635.) All the prosecutor was doing, however, was reminding the jury of the position that petitioner had taken from the very beginning of the investigation, *i.e.*, that the amounts due from Zerillo's Riverbank Canning company were repayable to petitioner personally even though advanced by the corporation. (R. 1518-1520, 1526.) They were shown as assets of petitioner as of the beginning of each of the first two prosecution years on the net worth statement submitted by petitioner to the Treasury agents in June, 1950, four years before the grand jury proceedings. (*Supra*, pp. 6-7; Govt. Ex. 22.) The prosecutor was not referring to petitioner's testimony before that body.

[11] The only personal record shown to the agents, aside from the net worth statements, was a transcript of one of petitioner's numerous bank accounts for the year 1947. (*Supra*, p. 7; R. 1231-1235.)

(*Supra*, p. 5.) Sonkin discussed this matter with petitioner and, after being told about the alleged $125,000 cash gift from Rinelli (*supra*, p. 6), asked petitioner to submit a statement of his net worth. Petitioner did so in June, 1950. In August, 1950, Silbert, a special agent specializing in tax fraud cases, was assigned to collaborate in the investigation. Silbert and Sonkin called upon petitioner, and Silbert introduced himself as a special agent. Silbert warned petitioner of his constitutional rights, and petitioner replied that he was familiar with them. Silbert and petitioner discussed petitioner's net worth statement in detail, after which Silbert requested additional information as to his net worth and expenditures. Petitioner furnished it in writing. (R. 109-112, 127-129, 147, 174-175, 195-197, 203-204, 1170-1179, 1198-1204, 2198-2199; Govt. Exs. 22, 22a.)[12]

Petitioner, relying on *Gouled* v. *United States*, 255 U. S. 298, 305, argues that the net worth statements he furnished the agents should have been excluded from evidence because at the time of their submission the inquiry had assumed a new dimension in that it then had criminal as well as civil aspects, and that he should have been so advised. The *Gouled* case furnishes no support for the argument; the language quoted from that case (Pet. 12-13) relates to docu-

[12] When the additional net worth information furnished to Silbert by petitioner was offered in evidence, petitioner asked for and received a hearing, outside the jury's presence, on its admissibility. The trial judge concluded that no constitutional rights had been infringed, and denied the motion to suppress. (R. 1189-1219.)

ments stolen from the defendant by an army intelligence agent with whom the defendant was acquainted and who, acting under the direction of his superiors, gained admission to defendant's office under the pretense of making a friendly call (255 U. S. at 304). Plainly the Court of Appeals was right in holding (Pet. 30) that "no such deception is inherent in Agent Sonkin's concededly truthful description of his purpose as a 'routine audit' * * *." Certainly petitioner knew from the outset that if the agents found the kind of flagrant tax evasion shown here there was a reasonable chance that he would face criminal prosecution. The holding here is in harmony with the holdings of other Courts of Appeals which have passed upon the point. *Turner* v. *United States*, 222 F. 2d 926, 931 (C. A. 4th), and cases cited; *United States* v. *Frank*, 245 F. 2d 284, 285-286 (C. A. 3d); *Montgomery* v. *United States*, 203 F. 2d 887, 892-893 (C. A. 5th); *Hanson* v. *United States*, 186 F. 2d 61, 64-65 (C. A. 8th).

3. Petitioner's third contention, that Counts IV and V of the information were barred by the statute of limitations (Pet. 13-15), is plainly lacking in substance. Indeed, it need not be considered at all because no separate fines were imposed on those counts and the prison sentences are concurrent with those based on the other five counts on which petitioner was convicted. (*Supra*, p. 4.)[13]

[13] The statement (Pet. 13) that the evidence relating to those counts, *i.e.*, the falsity of the net worth statements submitted to the Treasury agents by petitioner (*supra*, pp. 6-7), would have been inadmissible if they had been dis-

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys.

JUNE, 1959.

U. S. GOVERNMENT PRINTING OFFICE 1959 — 508984 1559